Supreme Court, U.S.
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No. 02-542

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

SHEILA MARTIN AND WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITIONER'S REPLY BRIEF

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10 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 1

I. The Arkansas Supreme Court's Decision Results in a Denial of Due Process. 1

CONCLUSION 6

TABLE OF AUTHORITIES

Federal Cases

City of Detroit v. Grinnell Corp., 356 F.Supp. 1380 (S.D.N.Y. 1972).....4

Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir. 1975).....2, 4, 5

Hansberry v. Lee, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22, 132 A.L.R. 741 (1940).....2

In re Milken and Associates Securities Litigation, 150 F.R.D. 46 (S.D.N.Y. 1993).....4

Petrovic v. Amoco, 200 F.3d 1140 (8th Cir. 1999).....3

STATEMENT OF THE CASE

Respondents Sheila Martin, et al. deny the factual allegations made by the Petitioners with respect to the financial condition of Respondent Westark and its transactions with the class, not on the basis that the allegations are untrue, but because they "are not supported by the Arkansas Supreme Court's opinion or by any document contained in the Appendix." The fact is that neither Ms. Martin *or* Westark offered any such evidence in their roles as proponents of the class action settlement agreement nor did they offer any evidence to refute that elicited by the Petitioners. In other words, the facts set forth by the Petitioners were uncontroverted and Petitioners stand by their Statement of Facts.

Moreover, Respondent Martin states she presented "the testimony of Chris Lawson, a partner at the law firm of Friday, Eldredge & Clark" in support of the settlement. The record is clear, however, that Mr. Lawson specifically stated that his testimony was limited only to the fact that he was recommending that his handful of class-member clients accept the proposed settlement and that he was not testifying to the fairness of the settlement itself.

Westark did not present the testimony of Mr. Forsey as alleged by Respondent Martin, as Westark offered no evidence whatsoever in support of the settlement agreement, but was compelled to testify by the Petitioners by subpoena. Westark did elicit some evidence from Mr. Forsey on cross-examination.

REASONS FOR GRANTING THE PETITION

I. The Arkansas Supreme Court's Decision Results in a Denial of Due Process.

The issue raised by the Petitioners is not one of mere semantics, i.e., whether this is a question of law or a question

of fact. Even Respondent Martin flip-flops in her statement of the question. Compare, "Petitioners ... argue that the Arkansas Supreme Court misapplied the applicable rule of law to the facts of this case." (Opp. Brf., p. i.) with "The Petitioners do not assert that the *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) standards fail to provide due process protections, but simply argue that the Arkansas Supreme Court misapplied the facts of this case to an otherwise properly stated rule of law" (Opp. Brf., p. 4) (emphasis added).

Indeed, the distinction has great significance on the development of class action due process in the State of Arkansas wherein the exercise of discretion by its trial courts is concerned. The whole purpose of the sought-after standards is to make sure that the trial court protects the rights of absent class members. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22, 132 A.L.R. 741 (1940). It is not enough for the Respondents to say that due process was satisfied because the Arkansas Supreme Court said so. That merely begs the question of this Court's oversight and role as final protector of rights under the U. S. Constitution.

Standards that exist in word, but not in deed, are no standards at all. The mere fact that the Petitioners prevailed below in having the Arkansas Supreme Court adopt – for the first time – objective standards against which the exercise of discretion of trial court in approving class action settlement could be judged is an empty victory if those standards are not going to be followed. If no objective standards apply, then there is nothing to tell us when discretion has been abused.

Respondent Martin asserts that the Petitioners misstate and misconstrue the Arkansas Supreme Court's ruling below as to the first standard: Comparison of the amount offered in settlement to the potential recovery. Almost every district and appellate court that has construed these standards has stated it to be the most important. Martin says the Arkansas Supreme Court's statement was that

"Petitioners' [sic] had a bona fide argument that Respondents, Martin et al., had a strong argument on the merits of their case against Westark." (Opp. Brf., p. 5.) (Emphasis added.) With respect, Respondent Martin is simply wrong. What the Court said was "Being mindful of this court's strong jurisprudence against usury as well as Article 19, section 13 of the Arkansas Constitution, we conclude that Ballard and Cain have a *bona fide* argument on the merits." (App. A at 10a.) In other words, when the Petitioners argued to the trial court that the potential recovery was in the millions of dollars because of Arkansas' constitutional usury prohibition, their argument was bona fide.

Moreover, even if Martin's interpretation were correct, it still supports Petitioners' argument that the potential recovery in the case was far, far larger than the amount offered – especially with the settlement agreement, in effect, permitted Westark to collect the settlement fund from the class members themselves, released its shareholders and sureties without any consideration, and permitted Westark to continue an obviously illegal activity.

That Westark would raise defenses of release and arbitration to class certification were of no moment since the Arkansas Supreme Court had consistently held *every* payday lender arbitration agreement unenforceable and had held that individual defenses cannot be raised to contest the procedural step of class certification. Further, Westark's reliance on *Petrovic v. Amoco*, 200 F.3d 1140 (8th Cir. 1999) (once a trial court has determined that a settlement is fair and adequate, the fact that a defendant could have paid more is not a legitimate reason to reject the settlement) is unavailing for it *presumes* an adequacy of comparison between the amount offered in settlement and the potential recovery. In other words, if a settlement offer is otherwise adequate, the fact that a defendant could pay more does not make it *in*adequate.

By the same token, the Arkansas Supreme Court's attempt to justify its departure from the first *Grunin* standard by relying on *In re Milken and Associates Securities Litigation*, 150 F.R.D. 46 (S.D.N.Y. 1993) and *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380 (S.D.N.Y. 1972) is inappropriate. *Milken* involved settlement of a securities suit where proof of damages was problematic and subject to wildly diverse determinations. In the instant case, the calculation of damages would have been a simple, mechanical exercise of multiplying the usurious fees collected times "2". *Grinnell* involved a case where the objectors stated that the settlement should be somewhere between 3 - 7 % of total billings, *not* the potential damages, and the district court held that a settlement of 3.2 - 3.7 % of billings was "within the ball park." *Grinnell* did *not* stand for the proposition that a settlement offer of 3.2 - 3.7 % of potential judgment was adequate. With respect, the court's focus should have been on evaluating the proponents' almost total lack of evidence with regard to their burden of proof and the trial court's lack of factual findings, *not* on justifying a $ 605,000.00 settlement versus potential damages of $ 27 million.

It is also not fatal to Petitioners' cause that the trial and appellate courts not assume that all damages alleged would be collected. That issue merely goes to the subsidiary standard of examining the defendant's ability to pay. However, in the instant case parties who had substantial potential liability, who had not been sued and were contributing *nothing* to the settlement, were simply ignored! This is not a mere failure to determine facts to the Petitioners' liking... This is a fundamental, procedural failure to protect the rights of absent class members. That is, the class representative was obliged to obtain and fair and reasonable settlement of claims and the trial court was obliged to ensure that process was met once the former adversaries presented it with a proposed settlement.

If millions of dollars were illegally taken from the class members by Westark (the remedy for which is liability for

double the amount collected), the profits from which were distributed to its shareholders as dividends, bonuses or otherwise, and Westark's sureties bound themselves to indemnify the class members for any and all violations of Arkansas law (presumably including its usury laws), due process would require that those potential sources of recovery for the class *at least be considered.* However, these issues were simply ignored by the trial court and the Arkansas Supreme Court: This is not a dispute by the Petitioners with how certain facts were decided... These facts were not appropriately addressed at all.

Further, to say that the Petitioners could simply opt out if they didn't like the settlement does not address the fundamental problem that the process used determined the rights of absent class members without adequate and appropriate inquiry by the judiciary. This process is meant to provide a meaningful proxy for those who are absent in order that justice may effectively determine their rights. But if their claims are small - as they were here - they have no means to deal for themselves outside of the class context. The Petitioners have been faulted for not simply opting out, but it must be remembered that they were proceeding for the benefit of the class and were pursuing Westark, its shareholders, and sureties before this settlement raised its head. They now speak not only for themselves, but also for the thousands whose rights were determined with only a few days' notice[1] and where the proponents of the settlement agreement put on essentially no evidence addressing the *Grunin* standards. Many more flaws with the settlement were raised below, but the Petitioners are here seeking a ruling from this Court as to <u>what</u> standards should apply in such a situation and <u>how</u> they should be construed.

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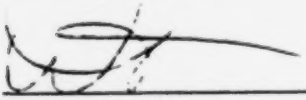
[1] With respect to the brevity of notice to class members, *Grunin's* facts are distinguishable in that the appellants had been actively involved in negotiations leading up to the settlement proposal, where here they were not. The citation to *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) is inapposite since the notice was apparently never challenged on appeal.

CONCLUSION

Respondent Martin alleges that the decision of the Arkansas Supreme Court below is unique to its facts and will not affect anyone beyond its immediate litigants. To the contrary, at bottom *every* case is unique to its facts. The consideration, it is submitted, is one of degree: If proper procedures are followed to protect the weak and absent as their rights are affected and some facts are determined adversely along the way, that is one thing. But where the settlement's proponents wholly abdicate their responsibility to make a record satisfying their burden of proving the settlement is fair, reasonable and just to the absent class members and where uncontroverted evidence is introduced in opposition to that premise; where the trial court does not apply objective standards in the first instance by which to gauge the settlement; and where the appellate court does not enforce those standards based on the uncontroverted facts before it, those standards arguably don't exist at all.

Respectfully Submitted:



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